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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1438

CROWN CENTRAL PETROLEUM CORPORATION, *Petitioner,*

vs

MYRTLE LUCILLE GOODMAN TREXLER, Administratrix of the Estate of ROBERT W. TREXLER, Deceased,
BARGE NO. 104, in rem,
L & L TOWING COPORATION,
SOUTHERN TRANSPORTATION CO., INC.,
Tug RAVEN, in rem,
VERMILLION TOWING CORPORATION,
RICHARD S. SMITH,
WILLIAM E. LAW,
ROBERT R. VERMILLION,
WILLIAM W. MARSHALL, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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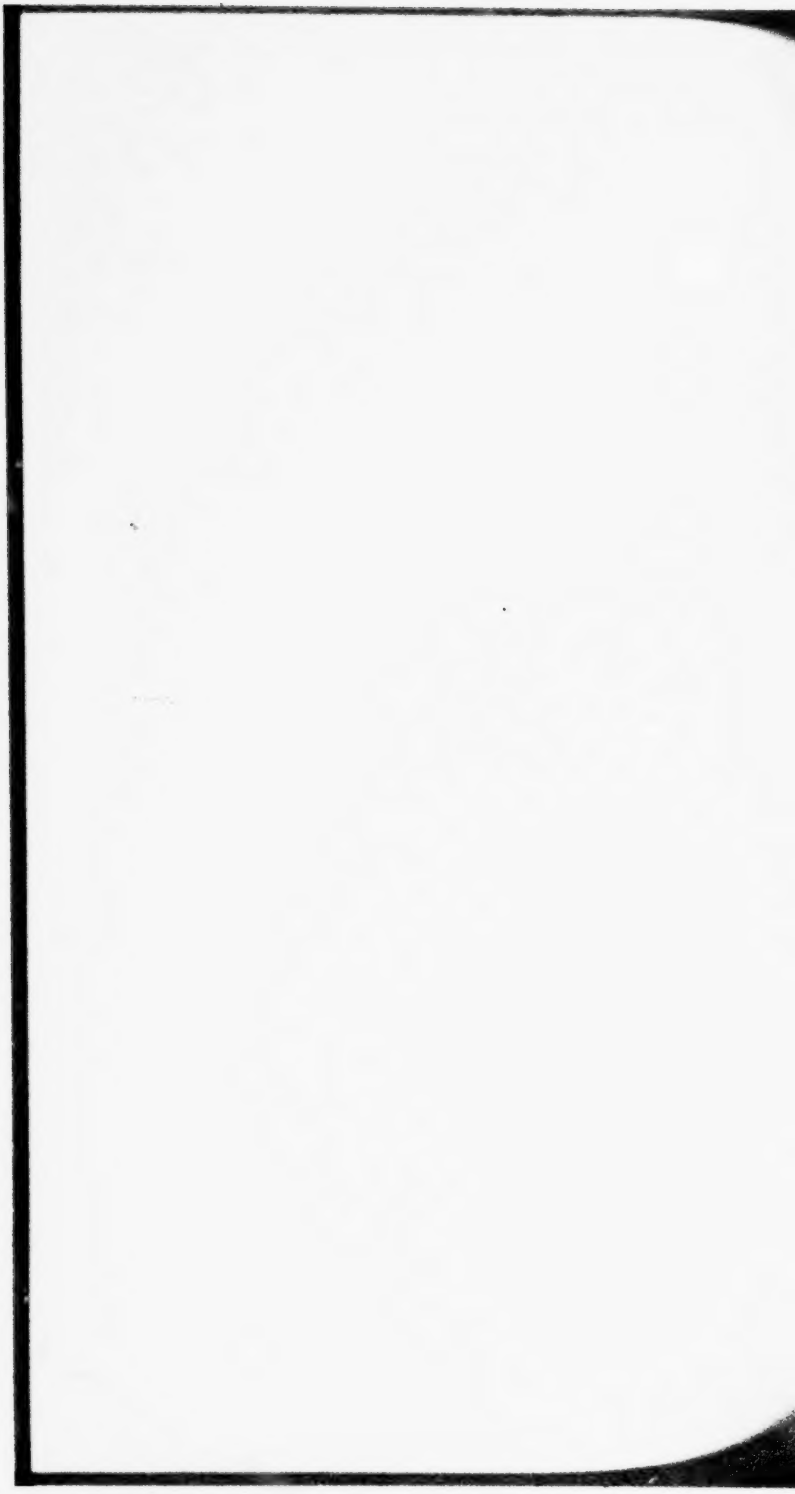

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Crown Central Petroleum Corporation respectfully prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Fourth Circuit, entered in these matters on January 22, 1970.

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OPINIONS OF THE COURTS BELOW

The Opinion of the District Court for the Eastern District of Virginia, (Walter E. Hoffman, Chief Judge), rendered on September 12, 1968, is reported at 290 F. Supp. 429 and is printed as Appendix A, infra. pp. 1a-42a.

The original opinion of the Court of Appeals for the Fourth Circuit, rendered on October 31, 1969, is not reported.

Upon Petition for Re-Hearing, denied by Order of January 22, 1970, (Appendix C, infra. pp. 49a-51a) the Fourth Circuit withdrew portions of its original opinion and substituted extensive modifications.

The modified opinion of the Fourth Circuit is reported at 419 F.2d 536 and is printed as Appendix D, infra. pp. 52a-78a, the "modified" portion being appropriately indicated. The portion "withdrawn" is printed as Appendix E, infra. pp. 79a-80a.

JURISDICTION

The judgment of the Court of Appeals was entered on January 22, 1970, Appendix C, infra. pp. 49a-51a. The jurisdiction of this Court is invoked under 28 U.S.C.A. §1254(1).

QUESTION PRESENTED

Where one plaintiff involved in several multiple-party suits that were consolidated for trial obtains judgment against only one co-defendant with a second co-defendant being absolved and dismissed from liability, fails to appeal from the District Court's judgment, does a Court of Appeals, upon the appeal of the first co-

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defendant and after reversing the judgment against the first co-defendant, have or acquire jurisdiction and power to grant the plaintiff judgment against the second co-defendant who was dismissed by final judgment in the District Court from which the plaintiff had not appealed?

STATUTE INVOLVED

The statute involved herein is the Time For Appeal provision, 28 U.S.C.A. §2107 of Chapter 133, United States Code, printed as Appendix F, infra. pp. 81a.

STATEMENT OF THE CASE

The undisputed facts as related by both the trial and appellate court disclose that the unmanned Tank Barge 104, (in tow of the Tug RAVEN), laden with 179,181 gallons of gasoline, arrived at Crown Central Petroleum Corporation's Richmond, Virginia, terminal shortly before Midnight, July 4, 1961. Discharge pumping from the Barge, under supervision of Smith, a licensed Tankerman and also the Tug's Mate, commenced between 12:15-12:30 a.m., July 5th, with delivery into Crown's shore-tank under supervision of Assistant Terminal Superintendent Chadwick.

Between 1:15-1:30 a.m. and shortly after Terminal Night Watchman Price had completed his 1:00 a.m. inspection, a fire engulfed and destroyed the barge, tug, portions of the terminal and adjoining real estate. Robert Trexler, a tug crewman, was fatally burned.

In the many ensuing multiple-party suits which were consolidated for purposes of trial, the District Court, sitting in admiralty, determined the *cause* of the fire by first determining (1) the place where the fire originally broke out and (2) the cause of ignition.

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In its opinion the District Court reviewed extensive ore tenus testimony, corroborating physical facts, expressly rejected the ore tenus testimony of Tankerman Smith as being uncredible and made the factual findings that the fire originated in the Barge's No. 4 starboard tank opening or dome and was ignited by Tankerman Smith's admitted use of an unapproved metal flashlight while inspecting that tank. The District Court absolved Crown from any liability, granted Trexler's Estate final judgment for a Jones Act death recovery of $96,388.59 against decedent's employer (Barge-owner) and provided for a reference to determine Crown's (and other claimants') damages. (District Court Judgment, Appendix B, infra. pp. 43a-48a).

Although the Barge and Tug owners appealed from the District Court's judgment against them, Trexler's Estate neither appealed nor cross-appealed from the District Court's final judgment absolving Crown of any liability and dismissing Crown from further proceedings. Thus in the Appellate Court below Trexler's Estate was an appellee to the Barge and Tug owners' appeal but otherwise was a non-appealing suitor in this multiple-party litigation. Nevertheless, in its brief as an appellee and at the time of oral argument, Trexler's Estate urged that in the event the Circuit Court of Appeals should reverse the District Court's Jones Act judgment against Trexler's employer, then Crown should be ordered to pay that judgment (Appendix G, infra. pp. 82a).

In its opinion the Court of Appeals accepts Smith's testimony, makes entirely different factual findings, inferences and legal conclusions and holds that notwithstanding Tankerman Smith's own contradictions, all the other conflicting ore tenus testimony and corroborating physical facts, the District Court was "clearly erroneous" in rejecting Smith's testimony. Thus the Court of Ap-

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peals originally granted Trexler Estate's request and ordered that a $96,388.59 Jones Act judgment in favor of Trexler's Estate should be entered against Crown Central Petroleum Corporation (Appendix E, infra. pp. 79a-80a).

The Court below subsequently denied Crown's Petition for Re-Hearing but by Order (Appendix C, infra. pp. 49a-51a) withdrew portions of its original opinion and substituted modifications thereof. The Appellate Court thus acknowledged it could not impose a Jones Act recovery against Crown because there had been no employer-employee relationship, but notwithstanding the Estate's failure to appeal, it did grant Trexler's Estate a $30,000.00 Virginia Death Act judgment.

The Court below dismissed all statutory appellate requirements and decisions of this Court and other Circuits as being merely "a rule of practice" which it could disregard.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

I. The Court of Appeals' Decision Below Is In Conflict With The Supreme Court's Decision In MORLEY CONSTRUCTION CO. v. MARYLAND CASUALTY CO., 300 U.S. 185 Which Established And Defined The Power Of An Apellate Court To Modify A Decree For The Benefit Of A Non-Appealing Suitor.

The crucial point here is whether a litigant who fails to take a separate or cross-appeal from an adverse final judgment entered in favor of one co-defendant, may, upon an appellate court's reversal of the trial court's factual findings and judgment against the second defendant, request and obtain judgment against the first co-

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defendant for whom final judgment had been entered in the trial court.

The point was met and directly answered in *Morley Construction Co. et al* v. *Maryland Casualty Co.*, 300 U.S. 185, 57 S.Ct. 325, 81 L.Ed. 593 (1937) in which this Court ruled that a Court of Appeals may not revise factual findings in favor of a non-appealing party if a revision of the District Court's judgment is incident to that factual revision. This Court said:

300 U.S. 185 at 191-192:

> "Without a cross-appeal, an appellee may "urge" in support of a decree any matter appearing in the record, . . . What he may not do in the absence of a cross-appeal is to "attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary. . . . The rule is inveterate and certain. . . . Findings may be revised at the instance of an appellant, if they are against the weight of the evidence, . . . This does not mean that they are subject to like revision in behalf of appellees, at all events in circumstances where a revision of the findings carries with it as an incident a revision of the judgment. . . . "Where each party appeals each may assign error, but where only one party appeals the other is bound by the decree in the court below, . . ."

The general rule that a separate or cross-appeal is necessary to enable an appellate court to revise factual findings in favor of an appellee is specifically followed in admiralty. *The MARIA MARTIN*, 12 Wall. 31, 20 L.Ed. 251, cited with approval in *Morley Construction Co.* (supra).

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In this case, Trexler's Estate did not appeal from the District Court's final judgment entered on October 23, 1968, absolving Crown from any liability. The Barge and Tug owners did appeal and thus Trexler's Estate became a non-appealing suitor.

In its brief as an appellee to the Barge and Tug owners' appeals, and at the time of oral argument, Trexler's Estate moved the Court of Appeals to enter judgment against Crown. The Court of Appeals granted that Motion and originally ordered that the $96,388.59 Jones Act judgment granted Trexler's Estate against his employer by the District Court should be transferred to Crown. In modifications to its original decision, the Fourth Circuit acknowledges that the Jones Act death recovery cannot be imposed on Crown but has imposed a $30,000.00 judgment under the Virginia Death Act.

A simple comparison of the District Court's opinion with the original and modified opinions of the Fourth Circuit reveals that in exonerating the Barge and Tug owners from any liability, the appellate court has not only revised the District Court's factual findings (i.e., as to the proximate cause of the fire, as to the place where fire originally broke out and as to the cause of ignition), but also has revised the District Court's judgment, both revisions being in favor and for the benefit of Trexler's Estate, (a non-appealing suitor) and against Crown for whom final judgment was entered in the District Court and from which there was no appeal.

The decision of the Court of Appeals For The Fourth Circuit has thus created a new appellate doctrine by assuming jurisdiction and exercising the power (and obtaining the result) which this Court prohibited in *Morley Construction Co.* and subsequent decisions. Its

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impact on future litigation and appellate proceedings in multiple-party actions will be staggering. No longer will any litigant in multiple-party litigation be able to determine when his case is terminated. Every appellate hearing in multiple-party litigation will become a trial de novo regardless of the intent of the parties as expressed by their actions. The litigants in multiple-party litigation are enabled to abrogate statutory requirements for appeals, to ignore the Federal, Civil and Appellate Rules, to initiate cross-appeals without adequate time or opportunity for a defense and to assert cross-appeals after designation and transmission of the trial record (which may be incomplete) to the Court of Appeals. This massive departure from this Court's established precedent, usage and practice demands careful review, scrutiny and consideration before it is condoned, permitted and established as precedent for future multiple-party litigation.

II. The Decision Below Is Contrary To Federal Statute, 28 United States Code, §2107 And In Conflict With The Supreme Court's Decision In GEORGE v VICTOR TALKING MACHINE CO., 293 U.S. 377 Requiring An Appeal As A Jurisdictional Requisite In A Court Of Appeals.

Title 28 United States Code, §2107 (Appendix F, infra. pp. 81a) provides that a notice of appeal must be filed within 30 days after entry of a final judgment. In *George* v *Victor Talking Machine Co.*, 293 U.S. 377 (cited in many subsequent decisions in various Circuits)this Court held that the statutes limiting time for taking an appeal are mandatory and jurisdictional.

The District Court's final judgment absolving Crown from any liability to Trexler's Estate was entered

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on October 23, 1968. Yet that Estate has never filed notice of appeal or initiated any other appellate action. Consequently the court below was without jurisdiction as to any appellate proceedings between Trexler's Estate and Crown Central Petroleum Corporation.

In modifications of its original opinion, the Fourth Circuit excuses the jurisdictional requirements of 28 U.S.C., §2107, and *George* v *Victor Talking Machine Co.*, as being merely "a rule of practice" rather than a rule of law and relies on *Langnes* v *Green*, 282 U.S. 531 (1931) as authority.

Langnes (1931—not 1938) decided six years prior to *Morley Construction Co.* (supra) was an admiralty appeal which this Court treated as a *trial de novo* bringing up all issues between all parties and thus necessity of an appeal was only "a rule of practice". However, 23 years later in *McAllister* v *United States*, 348 U.S. 19 (1954) this Court abolished the *trial de novo* concept of admiralty appeals and of course the 1966 amendments to the Federal Rules require separate appeals in admiralty just as in any other case. 9 Moore's Federal Practice, P. 72.05(1) at 3019.

Moreover, in *Calhoun County, Fla.* v *Roberts*, 137 F.2d 130 (1943) the Fifth Circuit reviewed *Langnes*, pointing out that the so called "rule of practice" permits revision only of a District Court's conclusions of law—not of its factual findings, as was done in the Court below in this case.

In view of *George* v *Victor Talking Machine Co.* (1934), *Morley Construction Co.* v *Maryland Casualty Co.* (1937), *McAllister* v *United States* (1954), the statutory requirement of 28 U.S.C. §2107 and the current status of the Federal Civil and Appellate Rules, *Langnes*

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(1931) is devoid of persuasion or authority. In any event, the application of the 1931 "rule of practice" to the complexities of modern multiple-party litigation merits thorough review and consideration.

III. The Decision Of The Fourth Circuit Court Of Appeals Below Conflicts With Decisions In Other Circuits, Including The First Circuit's Decision In COCHRAN v M & M TRANSPORTATION CO., 110 F.2d 519 (1940) And The Sixth Circuit's Decision In RICHLAND KNOX MUTUAL INS. Co. v KALLEN, 376 F.2d 360 (1967).

In *Cochran* v *M & M Transportation Co.*, 110 F.2d 519 (1940) the First Circuit held that a litigant may appeal or cross-appeal from a District Court judgment which grants only partial relief, but in the absence of such appellate action, the District Court's judgment becomes res judicata as to the issues decided against the litigant.

The Sixth Circuit has ruled in *Richland Knox Mutual Insurance Co.* v *Kallen, etc.*, 376 F.2d 360 (1967) that if one of multiple parties fails to file a timely separate appeal or cross-appeal from an adverse District Court decision involving one or more of the other parties in the trial court, then that adverse portion of the District Court's judgment not only becomes final as to the non-appealing litigant but the Circuit Court of Appeals is without jurisdiction to act thereon even though other portions of the District Court's judgment are properly presented to the Circuit Court by timely appeal of other parties.

In this case Trexler's Estate failed to take any appellate action whatsoever from the District Court's final

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judgment. Consequently the District Court's judgment absolving Crown of any liability to Trexler's Estate would be res judicate as to that issue in the First Circuit and the Court of Appeals would be without jurisdiction to act thereon in the Sixth Circuit. The decision below thus creates a new and different standard for multiple-party litigation in the Fourth Circuit than is practiced in the First and Sixth Circuits. Uniformity of procedure and in application of precedent demands that these differences be reconciled.

IV. The Decision Of The Court Below Contravenes The Principles Of This Court's Decisions In McALLISTER v UNITED STATES, 348 U.S. 19 And GUZMAN v PICHIRILO, 369 U.S. 698 And Constitutes An Abuse Of The Appellate Function.

The trial *de novo* concept of an admiralty appeal was abolished by the principle of *McAllister* v *United States*, 348 U.S. 19 (1954) in which this Court ruled that the "clearly erroneous" rule applicable to other civil appeals also applies in admiralty. Moreover, Rule 52(a), F.R.C.P. (Appendix H, infra. pp. 83a) provides: "Findings of fact shall not be set aside unless clearly erroneous and *due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.*" Applying these principles in *Guzman* v *Pichirilo*, 369 U.S. 698 (1962) this Court held that a trial court's refusal to credit and accept irregularly developed, questionable or uncorroborated *ore tenus* testimony, cannot be considered "clearly erroneous."

Having exonerated the Barge and Tug Owners from the $96,388.59 Jones Act judgment and in order to grant the non-appealing Trexler Estate some recovery, the Court of Appeals below has conducted a trial de novo

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of these multiple-party suits which had consumed eight trial days in the District Court.

Specifically, the Court of Appeals: (1) was unable to cite any facet in which the District Court's detailed analysis and recital of evidence was either unsupported or uncorroborated; (2) selects and substitutes the evidence rejected for credibility reasons by the District Court as the basis of the Fourth Circuit's decision; (3) excuses Tankerman Smith's untruths, inconsistencies, contradictions and prior statements, saying Smith was not "an accomplished or an over-intelligent witness"; (4) credits, accepts and adopts Smith's testimony as a basis and justification for new and different factual findings, inferences and conclusions; (5) criticizes Assistant Terminal Superintendent Chadwick's testimony as being uncorroborated (a criticism prohibited by Guzman v Pichirilo); (6) relies on Chadwick and admittedly "speculates" that Crown's Shore-tank No. 19 overflowed and caused the fire, (Appendix D, infra. pp. 52a-78a); (7) without any evidence or basis, concludes that Chadwick committed suicide as a form of "flight" from his criminal guilt and guilty conscience for having caused the fire.

The Court below thus so far departed from the accepted and usual course of judicial proceedings in admiralty appeals as to call for this Court's supervision. Otherwise the Circuit Court's unfettered exercise of power will stand as precedent for any use or abuse of appellate function and discretion.

CONCLUSION

The crux of this Petition points directly to the effect of the Fourth Circuit's decision on the expanding complexities of multiple-party litigation.

For the foregoing reasons assigned herein, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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